SUPREME COURT OF THE UNITED STATES.

OCTORER TERM, 1953.

No. 389.

FRANK WALTERS and EDWARD WILLIAMS, JR.,
Appellants,

vs.

THE CITY OF ST. LOUIS, JOSEPH M. DARST, Mayor,
and DEL L. BANNISTER, Collector,
Appellees.

BRIEF FOR APPELLEES.

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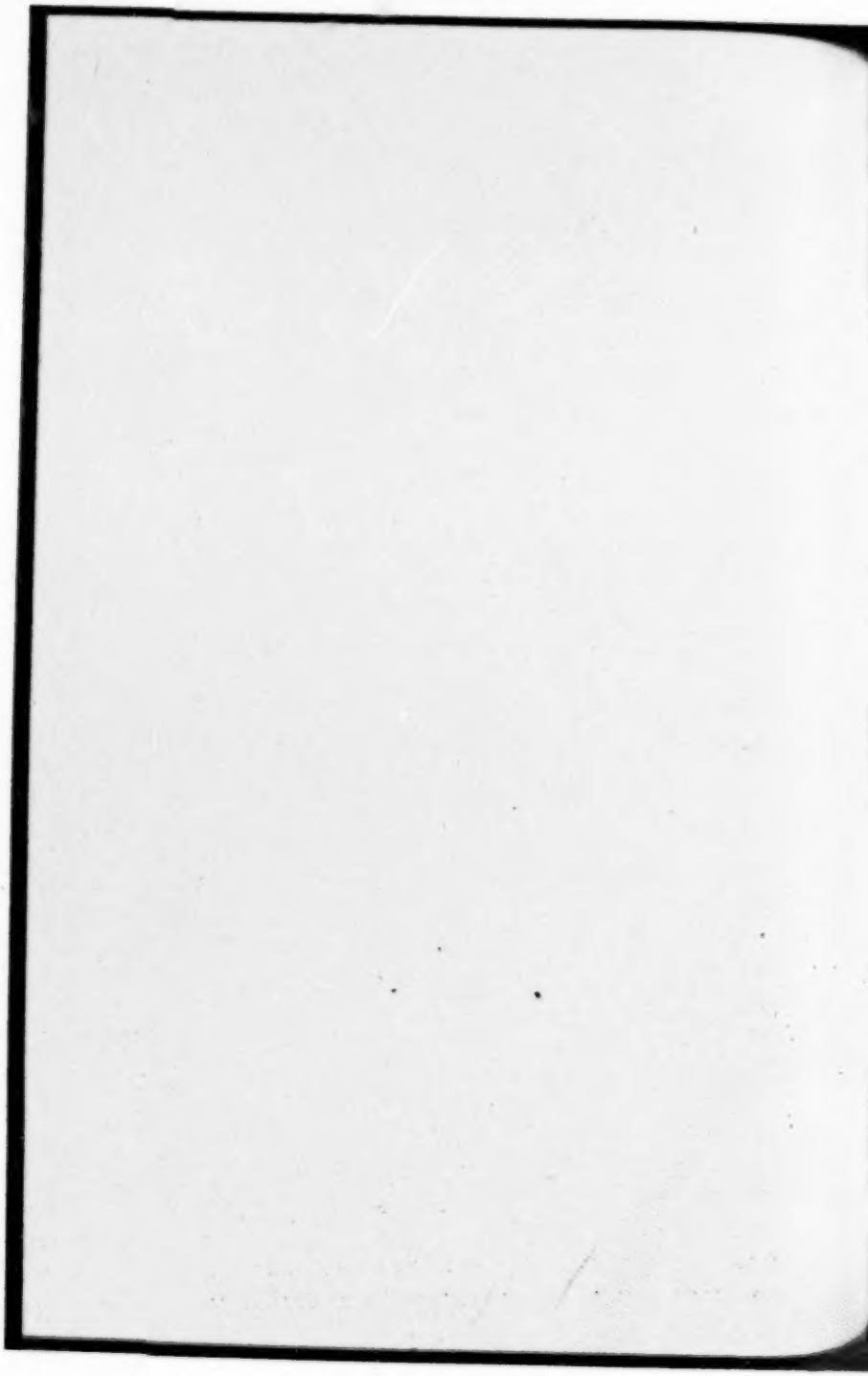

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(Emphasis ours except where otherwise noted.)

STATEMENT.

In the light of appellants' statements that the "federal questions to be reviewed were raised in the Court of first instance in plaintiffs-appellants' first pleading" and "that these questions were preserved for appellate review in the state court in appellants' motion for a new trial" (Appellants' Brief 2), and in view of the position of the appellees that Items 2 and 3 of the alleged "Questions Presented" (Appellants' Brief 5) covered later in Specifications of

Error 2 and 3 (Appellants' Brief 8) are not before this Court for review, we deem it necessary to point out what we regard to be inaccuracies in and omissions from the Statement of appellants as it relates to the subject matter of Specifications of Error 2 and 3.

Specification of Error 2 asserts that the Supreme Court of Missouri erred in holding and concluding that an ordinance was not void and constitutionally violative of the equal protection requirements of the Fourteenth Amendment "because an administrative officer promulgated a discriminatory regulation and sought to enforce said ordinance under said discriminatory regulation" (Appellants' Brief 8).

Specification of Error 3 asserts that the Supreme Court of Missouri erred in holding and concluding that "despite evidence in the record of the discriminatory administration of the ordinance against appellants" the denial of the equal protection of the laws under the Fourteenth Amendment was not properly before it (Appellants' Brief 8).

Appellants' claim that the federal questions to be reviewed were raised in their pleading and were preserved in their motion for a new trial necessitates a careful examination of the record.

An examination of the Amended Petition (R. 1-9) discloses that the only reference to rules and regulations contained therein is found in Paragraph 5 thereof and consists of an allegation that the ordinance in question "attempts to empower the defendant Collector of the City of St. Louis to promulgate necessary rules and regulations for the administration of the tax" (R. 3).

There is **no** allegation that rules and regulations were adopted; there is **no** allegation as to the content of any rule or regulation and there is **no** allegation that any rule

or regulation has the effect of rendering the state law or the city ordinance invalid and discriminatory.

We next examine the Amended Petition for the purpose of ascertaining the extent and scope of its allegations as to the violation of the rights of the appellants under the Federal Constitution.

The first reference to any such alleged violation is found in Paragraph 11 of the Amended Petition, wherein it is alleged:

> "That said **ordinance** hereinabove referred to, and said **enabling act, House Bill No. 50,** violated each and all of the foregoing provisions of the Constitution of Missouri and the equal protection of the laws requirements of the Fourteenth Amendment of the Constitution of the United States then in full force and effect and binding upon each of the defendants herein for the reason that said **ordinance** and **House Bill No. 50** seek to levy and collect taxes not uniform upon the same class of subjects and not within the territorial limits of said City of St. Louis, and further that said **Ordinance** and **House Bill** are arbitrary and discriminatory against wage earners as a class and particularly these plaintiffs" (R. 6).

The next reference to the alleged invasion of the rights of the appellants under the Federal Constitution occurs in Paragraph 15, wherein it is alleged:

> "and that said **ordinance** and said **Act, known as House Bill 50,** are arbitrary, unreasonable, discriminatory, vague and uncertain, and in violation of said Article I, Section 10, of said Constitution of Missouri and in violation of the due process and equal protection of the laws requirements of the Fourteenth Amendment of the Constitution of the United States" (R. 8).

There are **no** references in the Amended Petition to a claim of violation of the rights of appellants under the Federal Constitution other than the two heretofore set out and in neither of them is any claim made that the promulgation, the application or the enforcement of any rule or regulation has or will have the effect of violating any rights vouchsafed the appellants by the Constitution of the United States.

There is **no** allegation that the state law or the city ordinance will be enforced or systematically applied under and pursuant to any rule or regulation which has or will have the claimed effect of rendering the law or the ordinance violative of any rights possessed by the appellants under the Federal Constitution.

We next consider the allegations of the Amended Petition with a view to ascertaining the nature of the acts or threatened acts on the part of the defendants-appellees which the plaintiffs-appellants relied upon as the basis of their right to relief.

In Paragraph 1 of the Amended Petition it is alleged that the employer of the appellants has withheld and threatened to withhold the tax due on their wages "by reason of the enactment of an alleged **ordinance**" (R. 2).

In Paragraph 6 it is alleged that "it is claimed by all of the defendants herein named that said **Ordinance** is in full force and effect and will be enforced" (R. 4).

In Paragraph 7 it is alleged that defendant Collector has threatened to take into his possession such funds as may be collected by the employer and withheld by him (R. 4).

In Paragraph 16 it is alleged that "the said municipal corporation, through its agents and employees, has caused and intends in the future to cause said **ordinance** to be put into force and effect" and that unless restrained by the Court "from attempting to carry into effect said **ordi-**

nance" wages will be withheld; and that the damage "resulting by the attempted enforcement of such illegal **ordinance** is and will be incapable of ascertainment" in a court of law (R. 8, 9).

In Paragraph 17 it is alleged that plaintiffs-appellants have no adequate remedy at law unless the Court "shall issue its declaratory judgment and decree declaring said **ordinance** so adopted by the Board of Aldermen of the defendant City of St. Louis on or about the 27th day of August, 1952, as illegal and void" (R. 9).

In the prayer of their Amended Petition the relief sought is as follows:

> (a) That the court decree that "**said ordinance**" be declared illegal and void and of no force and effect.
>
> (b) That the court decree that "**House Bill Number 50**" be declared illegal and void and of no force and effect.
>
> (c) That the court restrain the defendants "from carrying or attempting to carry said **Ordinance** into effect" (R. 9).

There is no **prayer** requesting the court to declare any rule or regulation to be void, arbitrary or discriminatory; and there is no prayer that the court declare that the ordinance as systematically applied and enforced under and pursuant to any rule or regulation be declared void.

The only exhibit referred to in the Amended Petition is a copy of the **ordinance** which is attached as Exhibit A (R. 3, 4).

We next consider the judgment and decree entered in the trial court.

In Paragraph 2 of the decree the trial court adjudged that the state act and the city ordinance did not violate

the equal protection of the laws requirements of the Fourteenth Amendment to the Constitution of the United States and that said state law and city ordinance were not arbitrary and discriminatory against wage-earners as a class or the plaintiffs herein (R. 42).

In Paragraph 5 the court decreed that plaintiffs had failed to establish the allegation of their petition, that the ordinance and the state law were arbitrary, unreasonable, discriminatory, vague and uncertain and in violation of the due process and equal protection of the laws requirements of the Fourteenth Amendment (R. 43).

The decree and judgment of the trial court did **not** undertake to make any finding or ruling as to the existence of any rule or regulation, as to the validity of any such rule or regulation, as to the effect of any such rule or regulation and did not contain any finding or adjudication that said ordinance was being systematically applied and enforced under and pursuant to any rule or regulation.

We next proceed to a consideration of the motion for new trial filed by the plaintiffs-appellants with a view to ascertaining the questions preserved by them for review in the appellate court in said motion insofar as they relate to the subject matter of this appeal.

In Paragraph 2 of the motion for new trial it was alleged that the Court erred in finding and holding "**That the said act and the ordinance of the City of St. Louis**" did not and do not violate the due process and equal protection of the laws requirements of the Fourteenth Amendment (R. 44).

In subdivision (d) of Paragraph 5 of the motion for new trial it was alleged that the Court erred in finding and holding that "**plaintiffs have failed to establish the allegations of their petition,** that said **ordinance** and said **act**

known as House Bill Number 50 are arbitrary, unreasonable, discriminatory, vague and uncertain, and in violation of said Article I, Section 10, of said Constitution of Missouri and in violation of the due process and equal protection of the laws requirements of the Fourteenth Amendment of the Constitution of the United States" (R. 45).

There was **no** claim in the motion for new trial that the trial court erred in failing and refusing to pass upon the validity of any rule or regulation, or to take into consideration the effect upon the ordinance of any rule or regulation, or to rule as to the effect of any claimed systematic enforcement or application of the ordinance pursuant to any rule or regulation, or otherwise.

The **only** error complained of in the motion for new trial in connection with the claimed violation of the rights of the appellants under the Federal Constitution consisted of the alleged error in finding and holding that the **state law** per se and the **city ordinance** per se did not violate the Constitution of the United States and in ruling that the plaintiffs had failed to establish the allegations of their petition that the **ordinance** per se and the state law per se were in violation of the due process and equal protection requirements of the Federal Constitution.

The Supreme Court of Missouri, when the case reached it on appeal, held that the appellants had not raised in their pleading the questions of unconstitutionality arising out of any administrative or enforcemental rule and that this issue was not in the case.

In this connection the Supreme Court of Missouri said:

> "Furthermore, this action does not seek to have the ordinance declared unconstitutional because of any administrative or enforcemental rule adopted. A careful reading of the petition fails to disclose any men-

tion of the rules other than that the ordinance 'attempts to empower the defendant collector * * * to promulgate necessary rules and regulations for the administration of the tax, and authorizing every employer collecting or remitting the tax to deduct and retain therefrom three per cent of the total (fol. 45) amount withheld * * *.' Nowhere in the charging part or in the prayer of the petition is any complaint leveled against or relief sought on account of the rules. But appellants say the case was tried upon that theory and cite as authority for their assertion the agreed statement of facts, wherein a recital is made as to the adoption of the ordinance and promulgation of rules, and that a 'copy of said ordinance and said pamphlet is hereto attached, * * * incorporated herein by reference, pursuant to which ordinance and enabling act defendant Del L. Bannister (collector) claims the funds withheld from the wages of plaintiffs by defendant Shapleigh Hardware Co.'

"We are clearly of the opinion that such a recital in the agreed statement of facts cannot inject into the case an issue that is wholly foreign to the whole theory upon which the action is predicated and pleaded" (R. 57-58).

For the reasons above stated the Supreme Court of Missouri refused to make any adjudication as to the validity or effect of the rules and regulations.

A serious inaccuracy in appellants' statement appears in the following sentence on page 6 of their brief, wherein it is said:

"It is under this Ordinance, enacted on August 27, 1952, **and Regulations promulgated by appellee Bannister,** that the appellees make claims to certain funds withheld by Shapleigh Hardware from the wages of appellants (R. 16, 17)."

The record citation does not support the statement that appellees made claim to the funds **under the Regulations** promulgated by appellee Bannister.

This is what the record does show:

> "On August 27, 1952, the Board of Aldermen enacted into law Ordinance 46222, a so-called earnings tax ordinance, and on August 28, 1952, defendant Del L. Bannister did issue on behalf of defendant City of St. Louis, pursuant to Section Nine of said ordinance, in **pamphlet** form, certain information, instructions and regulations as a guide to taxpayers. A copy of said **ordinance** and said **pamphlet** is hereto attached, marked Plaintiffs' Exhibit 'A,' and is incorporated herein by reference pursuant to which **ordinance** and **enabling act** defendant Del L. Bannister claims the funds withheld from the wages of plaintiffs by defendant Shapleigh Hardware Co."
>
> Paragraph 3, Agreed Statement of Facts (R. 16, 17).

It thus appears that the funds were **not** claimed under the **Regulations**, but that they were claimed **only** under the **city ordinance and the state enabling act.**

SUMMARY OF ARGUMENT.

A. In taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Madden v. Commonwealth of Kentucky, 309 U. S. 83, 60 S. Ct. 406, 84 L. Ed. 590. One assailing the validity of the classification assumes the burden of demonstrating that the classification results in a wholly arbitrary, unwarranted and oppressive discrimination. Classification will be upheld if any state of facts reasonably can be conceived to sustain it. State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248.

There is a complete failure of the proof required to demonstrate that classification between the gross receipts earned as wages and the net profits derived from the conduct of a busines is without any conceivable reasonable basis; on the contrary, the distinction is based upon grounds that are patent and obvious.

Gross receipts derived from wages normally approximate the net gain derived from the services rendered, whereas gross receipts derived from the conduct of a business do not remotely approximate the net gain.

Generally speaking, gross wages of employes and the net profits of a business are as near to reaching the "take-home" pay as could be reasonably devised. City of Louisville v. Sebree, 308 Ky. 420, 214 S. W. 2d 248.

The fact that in comparatively rare and isolated cases one who earns a wage or salary may incur an expense in connection with the services he performs does not render the classification invalid. The maintenance of a precise scientific uniformity is not required. Lawrence v. State Tax Commission, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102.

Administrative convenience and expense in themselves justify a difference in treatment. Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245.

In the case of taxes due on wages earned, withholding is the only effective device for collecting the tax. If deductions are allowed from wages, withholding would be impractical, cumbersome and expensive.

Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U. S. 389, is not applicable. There the tax was imposed upon the gross receipts derived by corporations engaged in the public carrier business while individuals and partnerships engaged in the same business and competing with the corporations were not subject to the tax. Wage earners do not compete with employers. Here all wage earners are treated alike and all employers are treated alike.

The nature and form under which one exercises the right to earn income may result in a difference of tax burden. In the Quaker City Cab case it was recognized that a difference in the source of receipts might constitute the basis of a valid classification.

B. The alleged discriminatory administration of the ordinance is not subject to consideration in this appeal because the issue was not raised by the appellants in the state court or adjudicated by the state court.

The Supreme Court of Missouri held that this action "does not seek to have the ordinance declared unconstitutional because of any administrative or enforcemental rule adopted" (R. 57).

The Supreme Court of Missouri found that the issue was not raised by the petition of the appellants (R. 57), and that a recital in the agreed statement of facts, that the Collector had promulgated rules, a copy of which was in-

corporated in the agreed statement of facts, could not inject into the case an issue that was wholly foreign to the whole theory upon which the action was predicated and pleaded (R. 58).

Since the action was brought under the declaratory judgment statute of the State of Missouri, the decision of the Supreme Court as to the scope of the issues embraced in the pleadings was a matter of local law.

If this Court reviews the action of the Missouri Court involving a matter of local law, it will do so only to make certain that the non-federal ground of decision is not so colorable or unsubstantial as to be in effect an evasion of the constitutional issue. Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 654, 86 L. Ed. 1090. Appellants do not contend, nor have they any authority to demonstrate, that the decision of the Missouri Court construing the pleadings was based on colorable and unsubstantial grounds.

Where a statute is attacked as being repugnant to the Federal Constitution by reason of the method in which the statute was applied, the claim must be made in explicit terms. Charleston Federal Savings & Loan Assn. v. Alderson, 324 U. S. 182, 185, 89 L. Ed. 857. An independent review of the pleadings must lead the Court to the same conclusion as that reached by the Supreme Court of Missouri.

C. Since the Constitution of Missouri, Article V, Section 22, Constitution of 1945, and the statutory laws of Missouri, Chapter 536, Revised Statutes 1949, provide for a direct judicial review of the rules promulgated by an administrative officer, and further provide that such review shall include a determination as to whether any particular rule is authorized by law, this Court should refrain from passing on any constitutional issue involving the validity and effect of the administrative rules promulgated by the Collector until the Missouri Court has ruled as to their

validity and effect. Spector Motor Service v. McLaughlin, 323 U. S. 101, 105, 89 L. Ed. 101.

The power of the City of St. Louis to impose a tax stems from the authority granted by the state enabling act. The ordinance could not transcend the bounds set by the state law; nor could the regulation. Since the state law limits deductions from gross earnings to necessary expenses of operation only, any regulation which permitted deductions that did not constitute necessary expenses of operation would be invalid under the Constitution of Missouri, because not authorized by law. Article V, Sec. 22, Constitution of Missouri, 1945.

Since the Missouri Supreme Court has held that the issue as to the validity and effect of the regulation was not embraced in the pleadings, the appellants are not foreclosed from obtaining a judicial adjudication in a subsequent appropriate proceeding, and this Court should not undertake to determine the constitutional effect of the regulation until the Missouri Court has had an opportunity to interpret the regulation.

D. If federal income taxes and charitable contributions constitute necessary expenses of operation under the Missouri law, the allowance thereof as deductions does not render the state law or city ordinance invalid.

The claim in this case is that the discrimination violative of the Fourteenth Amendment arises out of the fact that wage earners are not entitled to deduct business expense, while those engaged in conducting business activities are permitted to deduct from gross receipts necessary expenses of operation. If the deduction of necessary expenses of operation does not make the statute violate the Fourteenth Amendment, the fact that federal income taxes and charitable contributions are regarded as necessary

expenses of operation would not render the statute and the ordinance obnoxious to the Federal Constitution.

Discrimination, if any, exists against the wage earner who is compelled to pay a higher tax by reason of the disallowance of items expended for working clothes, transportation, depreciation on tools, etc. (assuming that they are business expenses), to the same extent as if the discrimination arose from a failure to allow federal income tax payments and charitable contributions. If the discrimination in the one instance is not invalid, it cannot be invalid in the case of the other.

The allowance of federal income tax payments as deductions in the case of persons conducting a business is justifiable by reason of the fact that persons so engaged and subject to the tax are faced with the competition of others not subject to the tax. This is not true in the case of the wage earner.

E. Before one may claim that his constitutional right to the equal protection of the laws under the Federal Constitution has been invaded as the result of a discriminatory law, he must show not only that the discrimination exists, but that it has, or will, subject him to damage or injury. Constitutional questions may not be raised and adjudicated on behalf of a class as a whole. The party plaintiffs must allege and prove that the discrimination results in pecuniary loss or damage to them. Roberts & Co. v. Emmerson, 271 U. S. 50, 54, 70 L. Ed. 827.

Although the plaintiffs pleaded that the statute was discriminatory particularly as to them, no proof was offered in support of the allegation. The record does not disclose that plaintiffs had or would incur any business expense; any income tax liabilities; or that plaintiffs had or would make charitable contributions.

ARGUMENT.

A.

The Legislative Classification Embodied in the State Law (House Bill No. 50) and Carried Out in the Earnings Tax Ordinance (Ordinance 46222) Imposing a Tax Upon Salaries, Wages, Commissions and Other Compensation on the One Hand, and Upon Net Profits of Corporations and of Associations, Businesses or Other Activities on the Other, Does NOT Violate the Fourteenth Amendment.

Appellants concede that the legislative power to classify for tax purposes is of "wide range and flexibility" and that "there is a presumption of constitutionality favoring the taxing statute which can be overcome only by an explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes" (Appellants' Brief p. 14).

This Court has gone further and has stated that classification of a taxing statute will be upheld "if any state of facts reasonably can be conceived to sustain it."

State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 538, 51 S. Ct. 540, 75 L. Ed. 1248.

We realize that the nature of the issues presented does not warrant any extended discussion as to the precarious financial condition in which most large cities have been placed as a result of increased costs of operation coupled with demands for more extensive service.

This is particularly true of the City of St. Louis which, by reason of its unique and anomalous dual status under the Constitution of Missouri as a city and as a county (R. 20), is unable to extend its corporate limits, and is required to provide the funds for salaries and expendi-

tures of state officers performing county functions within its corporate limits, although the city has no control over the salaries and expenditures of these officers.

Conventional sources of revenue such as ad valorem property taxes and license taxes have proved inadequate to meet the needs, and out of the search for relief there has evolved the "earnings tax" (R. 20).

Some idea of the importance of the tax to the City of St. Louis may be gleaned from paragraph 12 of the Agreed Statement of Facts (R. 20, 21).

The petition of the appellants attacks the validity of the state law which enables the City of St. Louis to impose the tax, described as House Bill 50, and of the ordinance enacted pursuant to the authority granted by the state law, Ordinance 46222.

The state law authorizes the imposition of a tax on wages, salaries, commissions and other compensation received by residents of the city, on wages, salaries, commissions and other compensation received by non-residents for services rendered in the city, on the net profits of associations, businesses or other activities conducted by residents, on net profits of associations, business or other activities conducted in the city by non-residents, and on the net profits of corporations as a result of work done or services performed and business and other activities conducted in the city (Appendix to Appellants' Brief, 27-30).

The statute provides that the net profits or earnings of associations, business or other activities, and corporations shall be ascertained and determined by deducting the **necessary expenses of operation** from the gross profits or earnings (Appendix to Appellants' Brief, 28).

In State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 537, 51 S. Ct. 540, 75 L. Ed. 1248, this Court, speaking through Mr. Justice Roberts, said:

"The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578.

"The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 S. Ct. 43, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman & L. Co., 240 U. S. 342, 60 L. ed. 679, L. R. A. 1917A, 421, 36 S. Ct. 370, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 S. Ct. 192."

Appellants' first claim of discrimination violative of the Fourteenth Amendment is based upon the fact that one engaged in conducting a business or profession is permitted to deduct from his gross receipts the necessary expenses of operation whereas one whose compensation is derived from wages, salaries and commissions who may incur a necessary expense in connection therewith is not allowed to deduct the same.

It should be pointed out that the record is devoid of any proof as to the nature or quantum of the expense to which wage earners and salaried employes are necessarily subjected in connection with their employment and that no

such proof was offered as to the particular plaintiffs in the suit.

In the absence of such proof we must rely on the knowledge acquired through general experience and observation.

While there may be instances where the wage earner and salaried employe do incur expense directly connected with their employment, it is generally and normally true that the gross receipts derived from wages and salaries approximate the net gain realized by the employe.

It is difficult to believe that where expense is incurred the amount is substantial, for if such expense should become substantial it would be compensated for by a higher wage.

On the other hand the fact that gross receipts derived from the conduct of a business in no way represent the net gain derived by the owner of the business is patent and obvious.

One conducting a business ordinarily is required to acquire real estate or pay rent, to pay his employes, to purchase supplies, to maintain inventories, and so on ad infinitum.

In the City of St. Louis merchants and manufacturers are required to pay licenses based on sales as well as ad valorem taxes on inventories.

The necessary expenses of operation usually absorb a substantial part of the gross receipts.

These considerations lead the Supreme Court of Kentucky, in upholding an ordinance of the City of Louisville which levied a tax on wages, salaries and compensation, without deductions, and on "net profits" of business to say:

> "Probably the 'net profits' of the business of employers or a personal profession and the gross wages

or salaries of employees is (sic) as near to reaching the 'take home' pay as could be reasonably devised. The federal constitution does not demand absolute equality."

City of Louisville v. Sebree, 308 Ky. 420, 214 S. W. 2d 248, 256.

There is too a substantial difference between the classes, arising out of the fact that one who conducts a business is required to subject his capital to the varying fortunes that affect the economic life of the community.

The Supreme Court of Pennsylvania upheld an ordinance of the City of Philadelphia which made the same classification as is present in the Missouri statute and in the St. Louis ordinance, and in so doing said:

"Furthermore, salaries and wages are in their nature essentially certain, and free from the speculative features inevitably attached to net profits. A business or professional man at the end of a year of industrious work may find that his efforts have produced no net income,—only a loss. In another year his net profit may be tremendous. The salaried man or wage earner proceeds on a more even keel. He usually knows in advance of performance just how much his salary or wage will be. Also, he knows currently what he is earning, while the business or professional man generally calculates his net profit or loss on an annual basis. He has to operate and calculate on a long range basis. Many of our laws for the benefit of employees are based upon these, and other fundamental and universally recognized, differences between the earning position of an employee and that of a business or professional man depending, not on salary, but on net profits for his livelihood."

Dole v. City of Philadelphia, 337 Pa. 375, 11 A. (2d) 163, 166.

It is true that absolute equality might be achieved if wage earners and salaried employes were permitted to deduct necessary business expenses incurred.

There were and are, however, practical aspects in respect to the administration and collection of the tax which militate against such allowances and the legislative body may take these into consideration.

All wage earners and salaried employes who earn their livelihood in St. Louis are subject to the tax.

While the record does not show the number of such employes, some idea may be gained from the fact that the City has a population in excess of 800,000, and that a very large number of people who live in the suburban areas adjoining St. Louis and in East St. Louis across the river are employed within the city.

The only practical and convenient method of collecting the tax from these wages earners, or at least the most practical and convenient method, is through the device of withholding by the employer. Otherwise, thousands of persons subject to the tax could evade payment.

If deductions of business expense were allowed to employes, each withholding employer would be required to keep records showing, as to each employe, the business deductions claimed, to determine whether or not such deductions were in fact permissible, and to file separate reports as to each employe.

Such a procedure would subject the employer to substantial expense. In recognition of the fact that the employer sustains expense in connection with his obligation to withhold, the ordinance (Section Seven—Appendix to Appellants Brief 38) presently permits him to retain three per cent of the total amount he collects.

If substantially greater expense were to be incurred, a larger measure of compensation would be required.

But the additional expense would not stop at this point. A proper enforcement of the ordinance, in the event that deductions were permitted to wage earners, would require the employment by the City of St. Louis of a staff of auditors and investigators adequate to make the necessary and appropriate checks as to the validity and authenticity of the claimed deductions.

It may be contended that an alternative method of allowing deductions of business expense, in the case of wage earners, would be to continue with the existing method of withholding on the gross, and of permitting any employe who claims a business expense to file a return and a claim for refund.

Such a method would, of course, likewise require the employment of a large staff of auditors and investigators to examine the returns, and entail the additional expense of making out and mailing checks for refunds.

Under the ordinance, employes whose wages are withheld are not required to file a return (Section Five—Appendix to Appellants' Brief, 37, 38).

This fact in itself may be regarded as the equivalent of a form of deduction, bearing in mind the modesty of the tax imposed.

If the total amount of business expense incurred by an employe were one hundred dollars, the difference in his tax would be fifty cents.

In Carmichael v. Southern Coal & Coke Company, 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, it was held that an Alabama law which imposed an unemployment compensation tax on employers having eight or more employes did not violate the Fourteenth Amendment because employers having less than eight employes were not subject to the tax, and, in the course of the opinion, the Court

said that "administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others" (301 U. S. 495, 511).

The considerations of administrative convenience and expense, which justify in some cases the total exemption of small taxpayers, likewise justify the denial of deductions to small taxpayers, where the efficacy of collection would be impaired and where the cost of collection would be greatly increased if deductions were allowed.

Particularly should this be true in a case where the record fails to disclose that the deductions are substantial, and where experience suggests that on the whole they are not significant.

From what has been pointed out above, it follows that there are considerations which are at variance with the claim made by appellants that "the deductions allowed the class of non-wage earners * * * can just as conveniently be granted to the employed earner" (Appellants' Brief, 17).

It is true that appellants have suggested that "some practical equivalent" of these deductions can be granted to the employed earner.

It is clear that what the appellants have in mind is the inclusion in the ordinance of exemptions that are authorized by the state law (Sec. 8, H. B. 50—Appendix to Appellants' Brief, 29).

Exemptions, of course, would have to be uniform in character. In no true sense do exemptions achieve the equality for which appellants contend. Exemptions are arbitrary in amount, with no real relation to the amount any particular taxpayer expends. Thus, an exemption of $600 granted to every taxpayer for each dependent remains

the same whether the taxpayer has expended $200 or $2000 for the support of the dependent.

The statute envisaged the possibility that circumstances might arise when it should become desirable and in the public interest that exemptions be granted.

The exercise of the authority to grant exemptions is a matter of legislative discretion. There is no claim in the petition and no proof in the record of the existence of circumstances which brand the failure of the Board of Aldermen to grant exemptions as arbitrary, harsh and oppressive.

Appellants claim that the differences which exist between the two classes have no real and substantial relation to the object of the tax, to wit, the raising of revenue, in that the subjects of the tax are the same, that is, the "exercise of the right to earn income" (Appellants' Brief, 16).

Appellants, in this connection, assert that the "legal form or character" by which the taxpayer chooses to exercise his right to earn income is immaterial as it relates to a taxing measure.

We assume that the right to earn income has no higher or different status than the right to acquire and own property. One taxpayer may exercise the right to acquire and own real estate; another to own and acquire bonds or other forms of intangible property.

Does it follow that because both have exercised the same right, the intangible property must be subjected to the same ad valorem tax as is the real property?

In the very case of the exercise of the right to earn income, it has long been recognized that the "legal form and manner" in which the right is exercised may result in differences of taxation.

If a taxpayer undertakes to exercise his legal right to earn income in the form of a corporate enterprise he finds himself subjected to taxes that are different in amount than if he chose to conduct his business as an individual.

The economic impact on the community and of the revenues it may derive are affected by the form in which the right to earn income is exercised.

The individual who chooses to start a business in a community adds economic values which provide revenues. If he constructs a factory on a vacant lot he enhances the revenues derived from ad valorem property taxes. If he starts a manufacturing business in the factory, he enhances the revenues derived from the manufacturer's tax based upon the volume of his sales, and additional ad valorem taxes based upon his inventories. His contributions to the revenues perhaps make it possible for the city to levy an earnings tax of one-half of one per cent in lieu of the one per cent permitted by law; and if his example induces others to start a business, it may become possible to reduce the earnings tax to ¼th of 1%, or to eliminate it entirely.

We have pointed out some of the differences in the two classes which led the highest courts of three states, Pennsylvania, Kentucky and Missouri, to find a reasonable basis for the differences in classification.

We have referred to other differences which readily suggest themselves.

In the Carmichael case, supra, this Court, after stating that a state legislature, in the enactment of laws, has the widest possible latitude, went on to say:

> "In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a

record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action" (301 U. S. 495, 510).

The one case upon which the appellants rely is Quaker City Cab Company v. Commonwealth of Pennsylvania, 277 U. S. 389, 72 L. Ed. 927.

In that case a gross receipts tax was imposed upon all corporations engaged in the business of public transportation. Individuals and partnerships engaged in the identical business were not subjected to the tax. A majority of the Court held that there was no substantial basis for the singling out of corporations engaged in the business. Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Stone dissented.

A mere statement of the case, it would seem to us, suffices to demonstrate its inapplicability to the case at bar.

There can be no question that the imposition of the tax upon corporations imposed upon them burdens which placed them at a disadvantage in competing with individuals and partnerships engaged in the identical business.

In the case at bar wage earners are not in competition with their employers. Wage earners who earn their wages in the City of St. Louis, and to that extent compete with each other for jobs, are subject to the same tax.

Individuals, partnerships, associations, corporations conducting their business in St. Louis are treated alike.

Appellants stress the fact that this Court decided the Quaker City Cab case on the ground that "the character of the owner is the sole fact on which the distinction and

the discrimination are made to depend. The tax is imposed merely because the owner is a corporation" (277 U. S. 402).

Appellants fail to give effect to the language which immediately follows that quoted above and which is as follows:

> "The discrimination is not justified by any difference in the source of receipts or in the situation or character of the property employed" (277 U. S. 402).

It is clear from the foregoing that a difference in the "source of receipts" would constitute a reasonable basis for difference in classification.

The tax at bar does involve a classification based upon a difference in the source of receipts.

The source of receipts on the one hand consists of wages paid, which normally approximate the net gain and which are payable regularly, and without regard to the hazards of a business; on the other hand, the source of receipts consists of gross intake, involving risk, investment, employment of property, contractual obligations, subject to diminution by the necessary expenses incurred, sometimes resulting in large net gain, sometimes in small net gain, and sometimes in loss.

Appellants have failed to meet the burden which they recognize as theirs to demonstrate explicitly that there is no conceivable rational basis for the classification.

The classification embodied in the state law and incorporated in the city ordinance is reasonable because it is a classification "which an informed, intelligent, just-minded, civilized man could rationally favor" (Mr. Justice Brandeis, dissenting, Quaker City Cab Company v. Commonwealth of Pennsylvania, 277 U. S. 389, 406).

B.

The Validity and Effect of the Regulations and the Claimed Discriminatory Administration of the Ordinance Based Upon Appellants' Interpretation of the Regulations Are Not Subject to Consideration Upon This Appeal Because the Issue Was Not Raised by the Appellants and Was Not Adjudicated in the State Court.

In our statement we have analyzed in detail the allegations of the amended petition for the purpose of demonstrating that appellants did not raise or preserve, as they claim, any alleged federal question growing out of any rule or regulation promulgated, enforced or applied by the Collector, or growing out of any discriminatory administration or enforcement of the ordinance.

It would seem to us that one seeking the protection of the Federal Constitution against what is asserted to be hostile, arbitrary and oppressive discrimination should be required to set out his claim in language that is clear and wholly devoid of ambiguity.

The ordinance under attack was approved on August 28, 1952 (Appendix to Appellants' Brief 41).

The suit was filed on September 12, 1952 (Appellants' Brief 7).

The record does not disclose the date on which the amended petition was filed.

As we have pointed out in our statement the only reference to "rules and regulations" contained in the amended petition is found in paragraph 5 wherein it is alleged that the ordinance "attempts to empower the defendant Collector of the City of St. Louis to promulgate necessary rules and regulations for the administration of the tax" (R. 3).

We have further pointed out that nowhere in the amended petition is the alleged violation of Federal rights of appellants **predicated** upon the existence of rules and regulations, the interpretation of rules and regulations, nor the application, enforcement or administration of the ordinance pursuant to any rule or regulation, or otherwise.

The challenge that was made and the **only** challenge that was made in the pleading was a challenge directed at the state law based and **solely** based upon the provisions contained in the state law, and at the ordinance enacted pursuant to that law, based and **solely** based upon its provisions.

It is true that the Agreed Statement of Facts did recite that regulations had been promulgated and that a copy thereof was attached to and incorporated therein by reference (R. 16).

It is interesting and important however to note that in paragraph 4 of the Agreed Statement of Facts there appears the following:

"All constitutional provisions, state or Federal, legislative enactments, ordinances or city charters are stipulated **to have been well pleaded**, although no admissions are made as to their applicability and effect, and are hereby incorporated into this stipulation as though fully set out" (R. 17).

There is no stipulation that the "rules and regulations" referred to in the preceding paragraph of the Agreed Statement had been "well pleaded" and the omission of such a stipulation is significant.

The action below was instituted under and pursuant to the Declaratory Judgment law of the State of Missouri.

The construction of the pleadings for the purpose of determining the scope of the issues was a question of Missouri law.

The determination as whether the scope of the issues had been broadened or enlarged by matters set out in the Agreed Statement of Facts was a question of Missouri law.

Brown v. Western Railway of Alabama, 338 U. S. 294, 94 L. ed. 100, cited by appellants in support of their claim that this Court need not accept as final a state court's construction and interpretation of allegations in a complaint asserting a federal right involved an action instituted in Georgia under the Federal Employers' Liability Act.

The suit in the case at bar was brought under the Missouri declaratory judgment act and involved a number of questions of purely local law. See paragraphs 8 (R. 4), 9 (R. 5), 10 (R. 5, 6), 12 (R. 6), 13 (R. 7) and 14 (R. 7) of the Amended Petition.

It is true that this Court "in the performance of its duty to safeguard an asserted constitutional right may inquire whether the decision of the state court rests upon a fair and substantial basis." Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 654, 86 L. ed. 1090.

But its examination is "only to make certain that the non-federal ground of decision is not so colorable or unsubstantial as to be in effect an evasion of the constitutional issue." Memphis Natural Gas Co. v. Beeler, supra.

Appellants do not contend nor have they cited any authority to demonstrate that the construction given to their petition by the Supreme Court of Missouri was so colorable or unsubstantial as to constitute in effect an evasion of the constitutional issue.

All that they say in this regard is: "The **Ordinance's** denial of equal protection was alleged in the pleadings

under which the case was determined" (Appellants' Brief, 12). They do not claim, nor can they claim, that their pleading alleged that the ordinance as applied and as enforced under and pursuant to the regulations violated their constitutional rights.

Appellants do not cite any authority under the Missouri law or any decision of this Court which demonstrate that the failure to enlarge the scope of the **pleaded** issues as a result of evidence incorporated in an Agreed Statement of Facts was capricious or merely colorable or for the purposes of evasion.

This Court has held:

> "It is essential to our jurisdiction on appeal under [237 (a)] that there be an **explicit** and timely insistence in the state courts that a state statute, **as applied,** is repugnant to the Federal Constitution, treaties or laws."
>
> Charleston Federal Savings and Loan Association v. Alderson, 324 U. S. 182, 185, 89 L. ed. 857.

The Supreme Court of Missouri found that there was no explicit claim in the petition that the statute or ordinance as applied under the regulations violated the rights of the appellants under the Fourteenth Amendment.

An analysis of the petition fully supports this conclusion; and more it discloses that the petition does not even afford the basis of any implied claim that the constitutional protection was invoked by reason of the existence and application of any rule or regulation.

The Supreme Court of Missouri declined to interpret the rules, or their effect upon the state law and the ordinance upon the ground that the issue had not been raised by the appellants.

Therefore the only matters embraced and concluded by the judgment here under review are the validity of the

state enabling act as written and the validity of the ordinance as written.

Nothing in the judgment forecloses any taxpayer on a proper showing from challenging in the future the validity of any rule or regulation and the constitutionality of the ordinance as applied and enforced under a rule which is valid in Missouri.

The Supreme Court did intimate that in Missouri a rule which has the effect of making invalid a statute or ordinance otherwise valid would be void (R. 58).

It thus appears that the Missouri courts will not sanction rules and regulations of administrative officers which transcend the bounds of the statute.

Only in the event that a particular rule had been interpreted and declared valid would it become part of the statute. Then and then only could this court determine whether the statute or the ordinance as interpreted by the Missouri court did or did not violate the Fourteenth Amendment.

Since the Constitution and the laws of Missouri, as we shall point out in the next section of our brief, provide for a direct judicial review of the rules and regulations of the Collector, this court should not in advance of a ruling by the Missouri Court speculate as to the Missouri law on the subject.

C.

Where, Under the Law of the State, an Administrative Ruling Not Authorized by Law Is Invalid, and Where the Clear and Unequivocal Right to a Direct Judicial Review of Such Ruling Is Guaranteed by the Constitution of the State and Implemented by the Statutory Laws of the State, This Court Should Refrain From Ruling on the Constitutionality of the State Law Where Lack of Constitutionality Is Predicated Upon the Administrative Rule, Until the State Court in an Appropriate Proceeding Under an Appropriate Pleading Has Determined the Validity, Meaning and Effect of the Administrative Rule.

This court does not lack familiarity with the reaction of the public and the bar to the practices of administrative agencies and officers during the decade or two past which have led to and resulted in substantial curtailments of the powers previously exercised by such administrative agencies and officers, including the power to promulgate and adopt rules affecting the rights of the citizen.

So important was it to the people of the State of Missouri that administrative agencies and officers be limited to the exercise of powers conferred upon them by law that they provided in adopting their new Constitution in 1945 as follows:

> "All final decisions, findings, **rules**, and orders of any administrative officer or body existing under the constitution or by law, which are judicial, or quasi judicial and affect private rights, shall be **subject to direct review by the courts** as provided by law; and such review shall include the determination whether the same are **authorized by law**, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon

the whole record." Article V, Sec. 22, Constitution of Missouri, 1945.

The appellee Bannister, Collector of Revenue of the City of St. Louis, who promulgated the regulations in question, occupies an office created by state law, Sections 52.010 and 52.020, Missouri Revised Statutes 1949 (Appendix), and his administrative decisions, and the rules and regulations which he promulgates are within the scope of the provisions of the Constitution of Missouri above quoted.

The constitutional provision has been implemented by the administrative procedure act of Missouri. Chapter 536, Missouri Revised Statutes 1949.

The Collector of Revenue of the City of St. Louis as a state officer is subject to the provisions of that act.

Section 536.040, Missouri Revised Statutes 1949, provides:

> "Any person may petition an agency requesting the promulgation, amendment or repeal of any rule" (536.040, R. S. Mo. 1949).

Section 536.050, Mo. Rev. Statutes 1949, provides:

> "The power of the courts of this state to render declaratory judgments shall extend to declaratory judgments **respecting the validity of rules, or of threatened applications thereof,** and such suits may be maintained whether or not the plaintiff has first requested the agency to pass upon the question presented."

The said section further provides:

> "Nothing herein contained shall be construed as a limitation on the declaratory or other relief which the courts might grant in the absence of this section."

The ordinance in question was enacted by the City of St. Louis under and pursuant to the state enabling act. The

Supreme Court of Missouri had previously ruled in Carter Carburetor Corporation v. City of St. Louis, 356 Mo. 646, 203 S. W. 2d 438, that the City of St. Louis did not have the power to levy the tax under its charter.

It is clear that the authority conferred upon the City of St. Louis was limited to the terms of the enabling act.

The enabling act specifically prescribed that the "net profits" of associations, businesses or other activities and corporations "shall be ascertained and determined by deducting the **necessary expense of operation** from the gross profits or earnings" (Appellants' Brief 28).

The appellants somewhat blandly assert that the regulations promulgated by the collector authorize the deduction of Federal income taxes, interest on indebtedness and charitable contributions, whether the same be incurred or paid out in connection with the business carried on or personally.

Article V, Sec. 22, of the Missouri Constitution quoted above not only provides for direct judicial review of rules promulgated by the administrative officer, but specifically provides that the judicial determination shall extend to a determination of the question as to whether the rule is **authorized by** law.

Since the law authorizes only the deduction of **necessary expense of operation**, and since the ordinance could not contravene the terms of the enabling act, no citation of authority should be necessary in support of a proposition that under the organic law of the State of Missouri the collector could not validly permit the deduction of any item unless such item constituted a "necessary expense of operation."

The appellants categorically state in their brief that the Federal income tax does constitute a necessary expense of operation within the meaning of the Missouri statute.

This question has not been decided by any Missouri court. Neither the appellants nor any other taxpayer have seen fit to invoke the jurisdiction of the Missouri courts, so freely and liberally given by the Constitution and laws of Missouri, for the purpose of obtaining a judicial determination as to whether the Federal income tax does or does not constitute a necessary expense of operation within the meaning of the statute.

It would, of course, be ridiculous to contend, as appellants apparently do, that interest paid by a taxpayer on a **personal** indebtedness having no relation to the conduct of his business constitutes a necessary expense of operation. In the light of the limitation prescribed by the statute we submit that the construction placed by the appellants upon the regulations as permitting the deduction of interest on personal indebtedness or other items not connected with business, is wholly unwarranted.

The question as to whether or not a charitable contribution may constitute a necessary expense of operation is in our judgment not free from doubt in the light of the fact that local communities throughout the United States are dependent in large part upon gifts by large corporations and business enterprises and by the fact that the making of such gifts advances the public relations of the donor and enhances his standing and prestige in the community.

But whether or not Federal income taxes or charitable contributions do or do not constitute necessary expenses of operation the fact remains that the Missouri court has not passed upon the questions and it is the decision of the Missouri court which controls as to the construction of the Missouri statute.

Thus this court held in Illinois Central Railroad Company v. Minnesota, 309 U. S. 157, 84 L. ed. 670, that the

construction by the state court of the term "gross earnings" was a matter of state law.

The statutes of Missouri earlier noted provide that the declaratory judgment powers of a Missouri court shall include the power to render a declaratory judgment as to rules of an administrative officer or the threatened application thereof. Section 536.050, Mo. Rev. Statutes 1949. Thus it was open to the appellants in the very declaratory judgment act they brought to request the Missouri court to determine the meaning of the rules and regulations promulgated by the Collector and the effect of the rules or of any threatened application thereof. Thereby they could have obtained from a Missouri court an authoritative interpretation of the meaning and effect of the rules and this court would not be obliged to speculate as to such meaning and effect for the purpose of determining whether the state law offended the Federal Constitution.

In their brief the appellants say that "The Collector, unlike the Supreme Court of Missouri, was not willing to let the meaning of that concept [necessary expenses of operation] change from time to time as 'accepted methods of account change' " (Appellants' Brief 20).

The foregoing is a somewhat startling statement in view of the fact that the regulations on their face contain the following statement:

> "This first issue of the rules and regulations, which is **flexible**, is intended as a **guide** to those subject to the Earnings Tax and **will be supplemented from time to time** as may be necessary" (R. 22).

This court, speaking through Mr. Justice Frankfurter, in Spector Motor Service v. McLaughlin, 323 U. S. 101, 105, 89 L. ed. 101, said:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication,

it is that we ought not to pass on questions of constitutionality—here the distribution of the tax power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of Federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that Federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law."

Mr. Justice Douglas, delivering the majority opinion of the court, in American Federation of Labor v. Watson, 327 U. S. 582, 595, 596, 90 L. ed. 873, said:

"The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning. When authoritatively construed, it may or may not have the meaning or force which appellees now assume that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation."

In the more recent case of Albertson v. Millard, 345 U. S. 242, 245, 97 L. ed. 983, 73 S. Ct. 600, the court in a per curiam opinion said:

"We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action."

As we have heretofore said, the appellants are not foreclosed by the adjudication in this case from instituting in the future an appropriate declaratory judgment action for the purpose of obtaining a binding adjudication by the

Missouri court as to the meaning and effect of the rules and regulations.

We submit that this court will have fully discharged its constitutional function if it limits its decision in this case to a consideration of the question as to whether the statute per se and the ordinance per se contravene the equal protection clause of the Fourteenth Amendment.

D.

If Federal Income Tax and Charitable Contributions Constitute Necessary Expenses of Operation Under the Missouri Law the Allowance Thereof as Deductions Does Not Render the State Law or the City Ordinance Invalid.

We have heretofore indicated that in our view the allowance of a deduction of any item that does not constitute a necessary expense of operation would be invalid as a matter of Missouri law for the reason that the enabling act specifically permits deduction of necessary operating expenses only.

If therefore the classification is invalid because it permits the deduction of necessary operating expenses by one who conducts a business and does not permit the deduction of necessary business expenses incurred by wage-earners and salaried employees, the **nature** and the **amount** of the operating expenses permitted to be deducted are immaterial.

Conversely, if the classification is valid it would seem that the nature and amount of operating expenses permitted would not and could not affect the validity of the classification.

The alleged classification is here attacked upon the ground that it creates discrimination. If wage-earner "X" becomes liable for a tax in the sum of $20.00,

whereas his tax liability, if he were permitted to deduct the cost of his working clothes, the cost of his transportation, and the depreciation on his tools (assuming that they are business expense), would be $5.00, he is discriminated against to the extent of the differential, that is to say $15.00.

If wage-earner "Y" is subject to a tax of $20.00, and if his tax liability would be only $5.00 in the event he were permitted to deduct his Federal income tax, he is discriminated against to the extent of the differential, to-wit, $15.00.

Would the appellants have this court hold that the discrimination against "X" because it arises out of a failure to allow his particular business deductions does not offend the Fourteenth Amendment, whereas the discrimination against "Y" does offend the Fourteenth Amendment because it results from the fact that "Y" had to pay an income tax? We cannot see how in any constitutional sense the discrimination is or can be affected by the fact that in one case it arises out of the payment by the taxpayer of one type of business expense, whereas in the other case it arises out of a different type of business expense.

There, of course, may be sound reasons of state policy which would deny to persons engaged in the conduct of business the deduction of the amounts paid in Federal income tax even though such amounts could or might be regarded as necessary expenses of operation.

The existence of such reasons no doubt actuated the City of Philadelphia and the City of Louisville to provide in their respective ordinances for the disallowance of Federal income tax payments.

On the other hand there may be and there are sound reasons of public policy which could or might have actu-

ated the Legislature of the State of Missouri to permit the deduction of all necessary operating expenses including Federal income taxes.

The state law authorizes and the earnings tax law imposes a tax on the earnings of all persons, associations and partnerships residing in the City of St. Louis without regard to the place where the earnings were derived. In other words, a resident of the City of St. Louis engaged in the conduct of a business who has branches in other cities and in other states makes a return and pays a tax upon the whole of his net profits.

It is manifest that in those other cities and in those other states the St. Louis resident is competing with others who are not subject to the earnings tax imposed by the ordinance. It is clear that every new tax adds an additional burden which makes it more difficult for the taxpayer affected thereby to compete with others not subject to the same burden. In view of the fact that the net earnings derived by the St. Louis resident in this competitive field are subject to the tax, cannot the legislature of the state justifiably ameliorate the burden of the new tax so as to enable the St. Louis resident to compete in such a way as it may make it possible for him to derive the earnings from business outside of the city and the state?

Not only is the St. Louis resident who conducts business outside of the city limits affected by the competition of others but all persons doing business in the City of St. Louis, whether resident or not, and all corporations doing business in the City of St. Louis are subject to competition by others not subject to the tax.

Thus International Shoe Company, which has large manufacturing plants in the City of St. Louis and which desires to sell shoes to Edison Bros., Inc., which has numerous retail stores in the City of St. Louis, must meet

the competition of manufacturers in New England who likewise desire to sell their products to Edison Bros.

Wage-earners who earn their livelihood in the City of St. Louis are not faced with competition by others who can offer their services for a lesser amount because they are not subjected to the tax burden for every wage-earner who works in the City of St. Louis and is paid wages therein is subject to tax without regard to residence. These considerations would justify the legislature in granting a deduction of all necessary expenses of operation without exception, so as to lessen, in some degree, the tax burden of one class which is faced with the competition of others who are not liable for the same tax, as compared with the other class not subject to such competition.

E.

Appellants Did Not Plead, Nor Have They Offered Any Proof, of Any Special Injury to Them by Reason of the Imposition of the Tax.

In their petition (R. 6, par. 11) appellants allege "that said Ordinance and House Bill are arbitrary and discriminatory against wage earners as a class and **particularly against these plaintiffs.**"

There is no allegation in the petition amplifying this conclusion; there is no allegation pointing out how, or in what respect, the enabling act or the ordinance is arbitrary or discriminatory as to the particular plaintiffs.

The Agreed Statement of Fact contains no statement showing how or in what manner the appellants claim to be discriminated against. There is nothing in the record to indicate discrimination as against the appellants. It is argued in appellants' brief (p. 21) that the appellants may not deduct interest, union dues, chauffeurs' licenses, income

taxes and 5% of charitable contributions, whereas a self-employed truck driver may deduct such items.

While it is true that practically everyone must make income tax returns, yet without a showing of appellants' incomes, their deductions and their exemptions, it is impossible to determine whether or not they are subject to income tax. Likewise, they ask us to assume that they are subject to property taxes, union dues and other expenses they enumerate. In the state of the record, these are all matters of pure conjecture.

This contention assumes that the appellants pay the various enumerated items, although there is neither allegation nor proof of such payments.

We take it that this question is not presented by the record in the case at bar, because of the absence of both allegation and proof. As this Court aptly said in Roberts & Co. v. Emmerson, 271 U. S. 50, 54, 70 L. Ed. 827, 833:

> "But the plaintiff is not in a position to raise this question. As this court has often held, one who challenges the validity of state taxation on the ground that it violates the equal protection clause, cannot rely on **theoretical inequalities**, or such **as do not affect him**, but must show that **he is himself affected unfavorably by the discrimination of which he complains.**"

And to like effect are:

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 121, 65 L. Ed. 165, 169;

Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 324, 80 L. Ed. 688, 698.

The rule was recently restated in Keegan v. United States, 325 U. S. 478, 506, 89 L. Ed. 1745, 1760, where it is said:

"No one can urge the unconstitutionality of a statute until he shows that it is applicable to him and **that he is injured by it.**"

And see Alabama State F. of L. v. McAdory, 325 U. S. 450, 461, 89 L. Ed. 1725, 1734.

It is clear that under the announced rule appellants have failed to plead or prove any injury for which relief may be granted.

CONCLUSION.

We have set out in our "Summary of Argument," supra, the several reasons upon which an affirmance of the decision of the Supreme Court of Missouri may properly be based. It is our position that these several grounds require an affirmance of the judgment.

Respectfully submitted,

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Attorneys for Appellees.

BLEED THROUGH-

APPENDIX.

Sec. 52.010, R. S. Mo. 1949:

"The offices of sheriff and collector shall be distinct and separate offices in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified; provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector."

Sec. 52.020, as repealed and re-enacted, Laws, 1951, page 386:

"Every collector of revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of said amount; provided, however, that no collector shall be required to give bond in excess of the sum of seven hudred and fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. * * *"

In the
SUPREME COURT OF THE UNITED STATES.

October Term, 1953.

FRANK WALTERS and EDWARD WILLIAMS, JR., Appellants, vs. THE CITY OF ST. LOUIS, JOSEPH M. DARST, Mayor, and DEL L. BANNISTER, Collector, Appellees.	No. 389.

CERTIFICATE OF SERVICE.

Receipt is hereby acknowledged of two copies of the brief of the appellees in the above-entitled cause this Friday, January 22, 1954.

Stanley M. Rosenblum,
Attorney for Appellants.